UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

– – –

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-2311 Hon. Marianne O. Battani
IN RE: All Auto Parts Cases	
THIS RELATES TO: All Auto Parts Cases	

DEFENDANTS' AND CERTAIN NON-PARTIES' OBJECTIONS TO THE MASTER'S ORDER

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Tuesday, May 16, 2017

APPEARANCES:

DEALERSHIP PLAINTIFFS

VICTORIA ROMANENKO
CUNEO, GILBERT & LaDUCA, L.L.P.
507 C Street NE
Washington, D.C. 20002
(202) 789-3960

To obtain a copy of this official transcript, contact:
Robert L. Smith, Official Court Reporter
(313) 964-3303 • rob_smith@mied.uscourts.gov

APPEARANCES: (Continued)

NON-PARTY OEMS

ADAM WOLFSON
QUINN, EMANUEL, URQUHART, OLIVER & SULLIVAN, L.L.P.
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017
(213) 443-3000

DANIEL T. FENSKE
JENNER & BLOCK
353 N. Clark Street
Chicago, IL 60654-3456
(312) 222-9350

SARAH GIBBS LEIVICK
KASOWITZ, BENSON, TORRES & FRIEDMAN, L.L.P.
1633 Broadway
New York, NY 10019
(212) 506-1765

DOMINIC SURPRENANT
QUINN, EMANUEL, URQUHART, OLIVER & SULLIVAN, L.L.P.
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017
(213) 443-3000

JEFFREY D. PERCONTE
DRINKER, BIDDLE & REATH, L.L.P.
191 N. Wacker Dr., Ste. 3700
Chicago, IL 60606
(312) 569-1361

TABLE OF CONTENTS

Page

Detroit, Michigan
Tuesday, May 16, 2017
at about 10:28 a.m.

— — —

(Court and Counsel present.)

THE CASE MANAGER: Please rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable Marianne O. Battani presiding.

You may be seated.

THE COURT: Good morning.

THE ATTORNEYS: (Collectively) Good morning.

THE COURT: All right. This is the defendants' and certain non-parties' objections to the Master's order. So let me have your -- wait a minute. May I have your appearances, please?

MR. WOLFSON: Good morning, Your Honor. Adam Wolfson, from Quinn Emanuel, on behalf of General Motors.

MR. FENSKE: Dan Fenske on behalf of Mitsubishi Electric.

MS. LEIVICK: Sara Leivick on behalf of Ford Motor Company.

MR. SURPRENANT: Your Honor, Dominic Surprenant, Quinn Emanuel, on behalf of the 17 Daimler entities.

MR. PERCONTE: Your Honor, Jeff Perconte on behalf of Nissan North America, Inc.

MS. McKEEVER: Susan McKeever on behalf of the FCA US, LLC.

MR. SHERKER: Elliott Sherker --

THE COURT: Are you going to argue?

MR. SHERKER: I'm not intending to, Your Honor, we haven't filed our own objections.

THE COURT: Okay. We don't need your appearances then, let's stick with the ones who are going to argue today.

Ms. Romanenko.

MS. ROMANENKO: Good morning, Your Honor. Victoria Romanenko for dealership plaintiffs. We'll be arguing in opposition of the objections and in favor of the Master's ruling.

THE COURT: Okay. Ms. Li, are you going to be --

MS. LI: Good morning, Your Honor. I'm not going to argue today.

THE COURT: Okay. Who's going to start, Mr. Wolfson?

MS. ROMANENKO: Your Honor, just one small housekeeping thing. We would suggest if Your Honor thinks this is a good idea to let whoever wants to argue go and then we would respond, we think that might be more efficient than trying to respond after each successive one.

THE COURT: Yes, I think one response would be sufficient.

MS. ROMANENKO: Okay. Great.

MR. WOLFSON: Good morning, Your Honor. My name is Adam Wolfson. I'm appearing here on behalf of GM, but I have been nominated to present some of the common arguments for the various other OEMs that filed briefs with us.

THE COURT: Are they all non-party OEMs?

MR. WOLFSON: Yes, yes. And there are a few OEM-specific arguments that some of my colleagues who announced themselves plan to address themselves, so I'm not going to speak on their behalf for those unique arguments.

THE COURT: Okay.

MR. WOLFSON: Before I begin, one question is whether Your Honor would like me to direct my arguments to any specific issues that you have questions about or whether I should just launch into it.

THE COURT: I think you should just launch into it. I mean, there are two main parts, let's discuss each of them.

MR. WOLFSON: Sure. So the Special Master's order ordered that non-party OEMs -- or I should say the OEMs to produce documents related to any proffers or discussions at initial meetings and then also the settlement agreements.

THE COURT: Let's talk about the initial meeting because I would like to have more of a framework for that.

MR. WOLFSON: Okay. Sure.

THE COURT: Describe for me, if you could, the circumstances in which the OEMs met with these suppliers. Defendant -- well, they may be defendants, they may not be defendant suppliers, but, you know, did -- how was the meeting set up? Are we going to discuss how to resolve this or we have a confession to make? I mean, what was the circumstance?

MR. WOLFSON: So, Your Honor, one constraint I have is that I understand as a general matter that many of these discussions were governed by confidentiality agreements, so I believe that I need to speak somewhat in generalities. But my understanding -- and also I can tell you that I don't have full insight into what other OEMs, how their process worked; however, I do understand the generalities of the way it did proceed.

THE COURT: All right.

MR. WOLFSON: The way it would proceed is that an auto parts supplier would either plead guilty or was implicated by other guilty pleas, and then a discussion started between them, between an OEM and a parts supplier, saying we think we need to have some sort of compensation for the collusion that happened against us. Typically before --

THE COURT: So before they met they really knew by way of these pleas and/or other information that this

particular supplier had participated probably in this?

MR. WOLFSON: It was the primary purpose to reach out and begin discussions in the first place. And before substance was discussed, I understand that there are generally pre-substantive discussions about how these would proceed, confidentiality agreements, things perhaps not in all cases but in at least several, tolling agreements in order to toll the statute of limitations on any claims, general framework discussions to make sure that these were confidential discussions and were kept within the bounds of knowing that they were settlement discussions in an effort to avoid having to file litigation or resolve out of court.

So the set-up before an initial face-to-face meeting or an initial video conference or an initial substantive teleconference was establishing that these would be confidential and specifically aimed at trying to resolve the brewing dispute between the parties.

So once there was -- well, one of the problems with the Special Master's orders is what constitutes an initial meeting; is it this first reach out where, well, we understand that your client had wronged our client, we need to set up a meeting to discuss that, is that the initial meeting? Is the initial meeting where the parties sit down face to face and try to discuss some of the substance so there is a framework for the settlement discussions to

proceed, is that the initial meeting? One of the problems here is there is not specificity as to when these things occurred, there is just an assumption that there were substantive discussions at the very beginning and we don't quite know what initial meeting means.

Once these conversations started though, we do believe that had the Special Master actually conducted a factual inquiry and looked into the facts of the discussions, because he didn't, but if he did, he would have learned and understood that these were discussions in furtherance of settlement, which is the keystone for the Goodyear settlement privilege. And had he conducted this factual inquiry, which we believe is necessary in order to make the privilege discussion -- or the privilege determination, then it would have been clear that these were in furtherance of settlement discussions.

And the plaintiffs, they have raised a couple of different arguments. They have said, well, they couldn't really be in furtherance of settlement because no litigation had been started yet, and we cited cases back saying no, no, that's not the purpose of privilege. Often courts want to encourage parties to settle before they even get into litigation, and the Goodyear privilege specifically protects those types of discussions because we want to encourage settlement, we don't want to burden the Court, we don't want

to force all of these OEMs to file however many dozen additional suits before this Court swelling the size of this MDL even more.

In discussing why the plaintiffs need or say they need these communications, they offer up a number of different reasons that largely go towards liability. I could read the full quote, it is in their opposition at page 4, but the gist is they want to know about the scope of the conspiracy, the length of the conspiracy, the method and conduct of the conspiracy, who was in the conspiracy, how normal bids as part of the bidding process for auto parts supplies was circumvented, and how the defendants concealed the conspiracy, and each of these points goes towards liability.

And why do I mention that? Because unlike the majority of Rule 26 relevance decisions on the scope of discovery, the Sixth Circuit was clear in Goodyear that there needs to be a, quote, legitimate admissible use for settlement communications in order for them to even be considered potentially discoverable. It is different than the normal Rule 26 analysis, but it is what it is based on the Goodyear opinion.

And for each of these purposes, the only ones that the plaintiffs have identified for seeking these communications, they all go towards liability, which is a

direct violation of Federal Rule of Evidence 408.

So beyond the fact that these are -- that we believe these are all discussions that were in furtherance of settlement, the next step, the one that is essentially game over under Goodyear is that there is no even contemplated admissible use for these documents and/or these communications, and therefore it is not discoverable under the Goodyear standard.

In addition, to the extent that these are -- these communications are desired in order to show how things worked in the industry, we believe there are far less burdensome, just more typical avenues of discovery that the plaintiffs have pursued at length, they have gone extensively to defendants, and any constraints on the documents that defendants have apply equally to the dealership plaintiffs and the other indirect purchaser plaintiffs as to the OEMs.

They also have access to discovery from the OEMs, that I know we are ironing out the final full extent of that discovery in this hearing and the next one, but the scope of what the plaintiffs have gotten from the OEMs or gotten agreements to produce is quite extensive and it goes towards what happened, how the OEMs were overcharged, when they were overcharged, what their costs were, the data that the indirect purchaser plaintiffs can use to try to assess that passthrough if they can prove it through their economist.

All of that sort of discovery is available and will be produced to them.

So the idea that settlement communications, which the Sixth Circuit is already skeptical of, will shed additional light on that considering that it is duplicative discovery at best but then also strongly protected and would be burdensome for the plaintiffs to produce because going back into these -- I'm sorry, the OEMs to produce going back into these communications --

THE COURT: Are the statements of the suppliers regarding their participation in this scheme, are those really something that should be protected or should not plaintiff know the scope and who is involved, how they did it, from the defendants' mouth? That would seem to me to take care of a lot of problems in this case.

MR. WOLFSON: Well, there's an important underlying policy that the Sixth Circuit talked about in Goodyear which is that in these discussions, there is a certain amount -- first of all, we can't take what somebody says about their liability at face value in these discussions. Plaintiffs will underplay, defendants will overplay the liability issues when they are discussing settlement, and at some point they reach an acceptable medium in order for there to be some sort of compromise.

The full and frank discussion of parties' positions

is also something that the Sixth Circuit wants to encourage, and making statements about liability discoverable despite the settlement privilege would defeat that, and it would lead to defendants actually being much less forthcoming with the OEMs in future settlement discussions if that does become discoverable.

The plaintiffs continue to have the ability to conduct discovery of these defendants and of the part suppliers; they can take depositions, they can look at guilty pleas, they can look at what they've admitted. To the extent there are Fifth Amendment depositions, they are able to seek and obtain discovery through that including potentially inferences down the line. All of this is fully available to them. They just want to see what was said directly to the OEMs in confidential settlement communications that unquestionably were part of settlement negotiations, so Goodyear protects that.

And frankly, for our purposes, we are worried as out-of-court plaintiffs or potential plaintiffs that forcing the defendants to produce those types of discussions will have a chilling effect on future settlements and force us unfortunately to file when we would prefer to deal with this as we have been, largely out of court and largely through confidential but more informal discussions as opposed to in a mediation.

So the chilling effects we believe are a very relevant and important point to consider, that, yes, a defendant saying, well, here's where we think we colluded, it is a good shortcut, I agree, but there is back and forth, that's not the end of the discussion. And the Special Master said, well, this initial proffer, this initial time where they said anything to you about what they thought their scope of liability was, that's discoverable but everything after that is not, and what's -- there is no real difference between those discussions except that --

THE COURT: It is hard to find the bright line to separate those two.

MR. WOLFSON: It is. And if we're in settlement negotiations, the bright line is when did settlement negotiations start? It's not when was liability first discussed within those settlement negotiations.

So our position is just that the Special Master made a non -- he made a finding without the facts before him that is in violation of the Goodyear privilege. There is very good reasons to stick with the privilege here because these so squarely fall within it, and that in any event, the plaintiffs, the reason they want these communications are not for admissible purposes which is another requirement of the Goodyear test.

THE COURT: Well, actually the Master did, in fact,

recognize the Goodyear privilege. It is just a matter of when did that privilege attach.

MR. WOLFSON: Complete -- absolutely, he did, and it is not -- it is -- our belief is that the error was by concluding that it only began at these, quote, initial meetings as opposed to when the parties first understood that they were in settlement negotiations.

THE COURT: I just can't quite grasp this. When they understood they were in settlement negotiations, must they not have then been in a meeting or planning a meeting, let's meet to discuss how we resolve this? That would be settlement.

MR. WOLFSON: Absolutely, and I believe this is part of problem. What is -- this is going back to what is in an initial meeting, quote/unquote, because that's in the order, is that if the initial meeting is that first e-mail or call, we believe that your client based on this guilty plea or based on this other fact owes our client some money or some compensation, then there is really no issue because that's an initial meeting and there is no discovery. But if the initial meeting is the first time that the parties all come together for the purposes of settlement, that's where we believe that it is -- already the privilege is attaching to those conversations.

THE COURT: Okay. Thank you.

MR. WOLFSON: No problem. Would you like me to move on to the settlement agreements?

THE COURT: Yes, please.

MR. WOLFSON: So the settlement agreements, Your Honor, we believe -- well, first of all, the requirement here is that the plaintiffs need to show relevance of the settlement agreements, and we don't believe that they have. And part of this is because they are indirect purchaser plaintiffs and the OEMs are direct purchaser plaintiffs. But also the broader issue is we need a reason why. Settlement agreements, yes, they sometimes are discoverable, and in some instances courts do order the production of settlement agreements, we acknowledge that. But there needs to be a good reason why to order settlement agreements because, again, you have this problem of creating chilling effects.

And here the plaintiffs' justifications for these, just summarizing, just paraphrasing, they say that, first, that they might shed light on the practices and the mechanics of OEMs' commercial relationships with their suppliers, that's their first reason. There's a lot of discovery on that, a lot. We are -- I mean, just from GM's perspective, we are producing an incredible amount of costing data, purchasing data, sales data, a whole bunch of information that talk about the historical practices -- that show literally the practices and the mechanics of our commercial

relationship with our suppliers, and the other OEMs are producing an incredible amount of information along similar lines. The defendants have produced an incredible amount of information on how the relationships and the mechanics of the OEM supplier relationship work.

So, first, right there, it is questionable to us why settlement agreements that shed unique light on that particular aspect of these cases.

The next justification they give is that the settlement agreements are commercial agreements rather than agreements to resolve pending court cases, and it is -- that's a bit of a rose by another name. The agreements settle claims between the parties. They are not resolving pending court cases but they are resolving disputes, they are resolving claims between parties. They include things like releases because the whole purpose of a settlement agreement is to resolve these claims and release future claims.

The idea that these would be commercial agreements that would be normally discoverable and as some sort of commercial -- it is going to affect price is, in our view, it is a bit misguided. But if there were changes in prices due to these agreements that were within the relevant periods that the plaintiffs are requesting, the price changes are going to be reflected in the copious amounts of data that we are producing.

So if we -- if -- and this is a big if, if there was a price change in parts that a supplier sold to an OEM as the result of a settlement agreement, it would already be reflected in the discovery that is being produced, and frankly it would be a -- it would be a price down, it would be a step down of some kind.

So if this is going to be used to show damages such as the delta between the previous part price and the subsequent part price, we believe that would also have problems with -- again with 408. We can't use settlement discussions or settlement-related documents to show damages. And if the idea is that, well, this is going to show the difference or a reduction in price and we can use that to establish our damages, then this runs into the similar problems as the settlement negotiations.

The plaintiffs have said this is relevant as a potential source of bias because OEMs have submitted declarations and affidavits in this case that -- about how their business works and that if there's a settlement agreement, that it might have given them a reason to shade the truth in those.

Frankly, I will put aside for a moment that these are OEMs that were cheated for over a decade and there's very little reason to support the suppliers that were the conspirators. But the broader point here is if there's

some -- something in the record to show that the OEMs are not describing their businesses accurately, the discovery that is already provided, the extensive discovery, would show that.

So, again, if we are balancing burden on the third party, the necessity for the discovery, again, we think that what we have already promised to provide is more than adequate to address that concern.

And then finally the plaintiffs argue that they can use the settlement agreements as a basis to understand what to request in terms of documents. I believe the Special Master has spoken to this point and I believe Your Honor has actually also mentioned this, that this subpoena was pretty big. We -- I believe the Special Master called it the largest in the history of the federal court system. But the plaintiffs knew what to request for and they did. They requested a lot of different documents, data, production of in some respects a huge swath of the OEMs' business for the past 20 years. They knew what to request. They don't need the settlement agreements now at this date to understand what to request document-wise.

So for the settlement agreements, we just believe that they are not relevant, and even if there is some minimal relevance, we have to balance burden. If we are going to force the third-party OEMs to produce their settlement agreements with the defendants, this comes back again to the

problem of chilling effects. If we produce them, not only are the plaintiffs requesting them going to see these settlement agreements, every single other defendant is also going to see these settlement agreements. Every single other OEM is going to see their competitor's settlement agreements.

These are sensitive materials. They deal with collusion and conspiratorial conduct that affected OEMs to different amounts but in large amounts for over a decade. And the fact that these sensitive financial terms could not only go to the conspirators that affected the OEMs for so long but also every one of their -- one of our competitors and mutually so, it creates a large problem and disincentive to have these negotiations really papered. It is -- there is a -- it just creates a lot of crosswinds that will make future settlement difficult.

So we are speaking also from a practical reason here. Due to the minimal relevance, due to the burden, and due to the fact that this will be spread across the wind, we don't believe that the settlement agreements should be produced here.

THE COURT: Okay. Thank you.

MR. WOLFSON: Thank you, Your Honor.

THE COURT: Mr. Fenske.

MR. FENSKE: Yes, Your Honor. Dan Fenske on behalf of Mitsubishi Electric, and I will be speaking on behalf of

all the defendants today.

I would like to take them in the same order that Mr. Wolfson took them in, and I will start with settlement communications and address some of the concerns that Your Honor -- or the questions that Your Honor asked Mr. Wolfson.

First, I took sort of a practical question, how did this work? And, again, like Mr. Wolfson, I have some restrictions on what I can say because of confidentiality agreements, but I can speak in general terms. And in general, when the conduct in question was made public through a plea agreement or an FBI search or something like that, at some point either the OEM or the defendant would reach out and say should we talk, and they will then generally enter into an a confidentiality agreement. The confidentiality agreement will make clear that all of the statements that are made pursuant to that agreement are for the sole purpose of settlement under Rule 408 and under the settlement privilege. They might also engage as part of that in a dispute resolution agreement that will define how the process of resolving the claims will go.

But the key point, Your Honor, is that these are not ad hoc discussions. These are discussions between -- usually between counsel for the defendant, counsel for the OEMs for the avowed purpose of discussing a potential resolution of claims. These are not business discussions or

anything like that in general.

And any of the statements that the Special Master generally -- target statements about the factual admissions about the misconduct in question, how the conspiracy operated, its time frame and et cetera, would take place generally after those sorts of either written or perhaps oral agreements were entered into. And so they were clearly were for, in the words of Goodyear, statements made, communication in furtherance of settlement, which under the plain language of Goodyear are privilege.

And Your Honor expressed some concerns, well, should they be protected? And the answer I think is yes, and the reason is very simple. The public policy favors settling dispute, and confidentiality is necessary to settle disputes because otherwise the parties won't make statements in the first place for fear they will be used against them, in the words of Goodyear, by some future third party like the class plaintiffs here.

So the question isn't if the Master's decision is upheld, the statements won't be made in the first place. The parties will have less information to evaluate an appropriate settlement and settlement will become much harder, and that's exactly why the court in Goodyear recognized the settlement privilege.

I mean consider this -- the impact on just the

class cases here. If the Special Master's decision were upheld and a defendant were -- it would logically apply to discussions with the class plaintiffs as well, and if you were engaged in settlement discussions, for example, with the indirect purchasers and you wanted to disclose facts about what happened, you won't do that if the DPPs can simply serve a discovery request and say tell me the same thing even though your settlement discussions with the DPPs, you are in a totally different posture with the DPPs as to settlement, so you will be dissuading parties from making the sorts of disclosures that are necessary to settle.

And I would just point out that the case law is fairly clear that Rule 408 and the settlement privilege, and they are essentially cousins, they are essentially very similar rule, apply to factual admissions. We cited in addition to Goodyear, the plain language of Goodyear itself, the Thornton case from the Northern District of Ohio applied the settlement privilege to interrogatory responses, factual admissions about the underlying contacts that were made to government regulators.

We cited a wealth of cases in our reply brief showing that courts clearly apply Rule 408 to factual admissions. And one court couldn't have put it better: it does not matter that the statements involved were not actually offers but rather facts proffered about the dispute.

So, Your Honor, this in our view is a fairly straightforward issue. The Special Master has ordered the production of agreements that are at the very core of the Goodyear settlement privilege and will dissuade the parties from settling.

On the initial meeting point specifically, in addition -- in addition to the fact that it --

THE COURT: What would those documents be if we are talking about this settlement -- not settlement agreements, I mean the discussions beforehand, what are we talking about?

MR. FENSKE: Well, that would again vary on a defendant by defendant basis, but there would generally have been a meeting. Assuming that these sorts of factual proffers happened, and I think it is safe to assume that generally they did in some fashion, there would have been a meeting and there would be documents created and associated with those meetings. Those documents may or may not be protected by other privileges like the attorney-client privilege or the attorney work product privilege, but in general there will be documents associated with that sort of initial meeting.

And the distinction between initial meetings and later meetings really make no sense when you look at the purpose of the -- the purpose of the privilege is to -- focuses on the purpose of the communication, not when it was

made. That's the same rule that is applied in the attorney-client privilege where the question is merely were the communications made for the purpose of seeking legal advice. And if they were even before an attorney-client relationship forms, we cited some cases on this, the Banner case, then the attorney-client privilege attaches even before the relationship forms.

And the same thing sort of happens here. The question is what is the purpose of the communication, and not when it was made, and we cited a number of cases for Your Honor on that.

And just to step back just to remind the Court, you know, our position is that the Court should review the Master's decision de novo, and we cited the case law that privilege issues are de novo, so there is no deference to the Master's decision on this point.

And it is telling that the auto dealers in their briefing do not cite a single case and we were not able to find one that actually compelled applying the settlement privilege within this circuit that actually compelled the production of settlement communications.

All of the cases that they cite involved the compelling other things, not settlement communications. The QSI case, the State Farm case, the Kelly case, none of those cases, the primary cases upon which they rely as to

settlement communications actually compelled settlement communications, and for the very good reason those are core aspects of the settlement privilege.

And just to build on a point that Mr. Wolfson made regarding the plaintiffs' supposed need for this information to learn about the scope of the conspiracy, obviously they have interrogatory responses that they can serve on the defendants, they have our DOJ productions, they have the ability to depose witnesses, they have cooperation from settling defendants, they have amnesty applicants, so they have a number of alternative sources to get this information.

But the fundamental point, and Goodyear expressly holds this, is that communications made in settling -- during -- for the purposes of settlement are never relevant, that's a quote from Goodyear, and the reason is because parties say things in litigation -- for settlement that may differ substantially from what their litigation position might be. You may make concession for -- a defendant may make a concession to a valued OEM customer simply because it wants to resolve the case and move on with its business relationship, not because it is conceding that there is any factual merit to the contention or not. They might just agree to disagree and compromise.

And so Goodyear says that because of that, because of puffering and posturing during settlement communications,

that settlement communications just are not relevant.

And unless Your Honor has any questions on that, I will move to settlement agreements.

Your Honor, I will be brief because Mr. Wolfson touched on most of the points here, but, again, this is a decision that in our view the Court reviews de novo. The Special Master did not make any finding that these settlement agreements are relevant. His sole ground for ordering their production was his finding that they are not privileged. Relevance is a question of law for the Court as we cite, and no question of the Master's authority is also a question of law as we cite in our reply brief on page 1.

The reason why the Master never made a finding that these are relevant is because nobody asked him to compel production of settlement agreements, and our submission is he exceeded his authority under the order appointing him by compelling the production of something that no party asked him to compel.

And of course the reason for that, the reason no one asked for it, the reason why this wasn't the focus of the briefing before the Master is because they are not relevant. There is -- as Mr. Wolfson laid out, and I won't go into it in too much detail, but the plaintiffs say that they need this to understand how the RFQ sourcing process and the business sort of relationship between the parties and how

that historically went, and, of course, no settlement agreement is going to give them that kind of information. It doesn't generally contain factual recitations of the business relationship between the parties.

To the extent that they -- they also say they want post-collusion pricing insight. Well, they are going to have the defendants' transactional data, they are going to have the OEMs' transactional data, they can have that information there, and in general, a settlement agreement that generally makes a lump sum payment isn't going to provide them that information.

And Mr. Wolfson addressed the issues associated with OEM bias.

And as to the discovery specifically, I will just note that their desire to have the settlement agreements for the purpose of formulating a discovery strategy is just insufficient as a matter of law. The question under Rule 26 is, is the information relevant to a claim or a defense. Its usefulness for formulating a discovery strategy is really beside the point.

And then just one last point, Your Honor, on again the chilling effect that producing these settlement agreements may have on the parties attempting to resolve their disputes. Under Rule 26, essentially this Court has to balance the need for this information against the other

public policy interests served by the confidentiality of these settlement agreements. And our position is fairly straightforward, that there is really, as I discussed, no need for these agreements.

And there is a serious possibility that if a defendant fears that their confidential settlement agreement or an OEM fears that its confidential settlement agreement will be produced to a third party, they won't be able to make the sorts of concessions that are necessary to solve cases because they will have -- fear that some third party in the future will use that against them, so it reduces options for parties to settle and makes it harder for them to settle.

So on the one hand we have no need for these, and on the other hand we have a substantial risk of chilling the ability of parties in this MDL and in private negotiations from reaching a settlement.

For that reason, Your Honor, we would ask that you reverse the Master's order.

THE COURT: Thank you.

MR. FENSKE: Thank you.

THE COURT: Ms. Leivick.

MS. LEIVICK: Good morning, Your Honor. Sara Leivick for non-party Ford Motor Company.

And just as an initial matter, Your Honor, Ford --

THE COURT: Non-party Ford?

MS. LEIVICK: Non-party. Ford has resolved its case against Fujikura, Your Honor, and is now a non-party in this action.

THE COURT: Okay. Thank you. I forgot that for a second.

MS. LEIVICK: Sure. So initially, Your Honor, Ford was not subject to the motion to compel that lead to the Special Master's order on request 31. Ford is continuing to work with the serving parties to try to work out any remaining issues regarding the subpoena, but the serving parties are seeking the same documents in response to request number 31. And Ford chose to submit its objection as an interested non-party because this is the first time that these issues have come before the Court, and Ford wanted to ensure that Your Honor understands the importance of these issues to Ford and that Ford has similar concerns regarding the Special Master's order as the other OEMs and the defendants do.

And like the other OEMs, Your Honor, ever since the disclosure of the auto parts cartel, Ford has been privately working to restore the business relationship between Ford and its suppliers and obtain redress for the harm caused to Ford by these conspiracies and avoid involvement in prolonged litigation. And Ford has been largely successful in these efforts and has avoided litigation in all but one case as

Your Honor pointed out.

But requiring production of the settlement agreements and the settlement communications as mandated by the order is not only contrary to law but would strike at the heart of these confidential negotiations as Mr. Fenske and Mr. Wolfson have explained. This could threaten future settlements and likely lead to additional litigation.

And the proposed invasion of the confidentiality interests of the OEMs and their suppliers is in no way proportional to the needs of this case where such an evasion is unlikely to resolve any of the issues in this action and the discovery can be obtained from other sources.

And Ford agrees with what has been said by Mr. Wolfson and Mr. Fenske, and I just want to make a few additional points. First, on the standard of review, Ford agrees that the order should be reviewed de novo because issues involving privilege and relevance are questions of law or mixed question of law and fact.

But even if the order is reviewed under an abuse of discretion standard, it should still be reversed because the Special Master did not exercise any discretion with respect to the issue of relevance of the settlement agreements, and his decision on the settlement communications is in contravention of Goodyear.

So I will just take the issues in the order which

Your Honor has been discussing them. With respect to the settlement communications, again, Ford's position is that these settlement communications are protected by the privilege established in Goodyear. And in requiring the production of these materials, the Special Master ignored the context in which a supplier would describe the scope of the conspiratorial conduct to an OEM customer. And Ford agrees with Mr. Wolfson and Mr. Fenske's description of the general process in which a supplier would come to an OEM and confess all of its misconduct, and such a confession, Your Honor, would only take place in the context of settlement negotiations and --

THE COURT: It must be a hard discussion to have.

MS. LEIVICK: I'm sorry?

THE COURT: That must be a really hard discussion to have.

MS. LEIVICK: Yes, Your Honor, yes. And a supplier would only be willing to do that if they knew that they were coming to an OEM, and as a result of this discussion and these negotiations they may be able to resolve their claims, hopefully without litigation.

And Master Esshaki drew a distinction that just does not exist in Goodyear and its progeny. Goodyear doesn't differentiate between factual communications made at the very beginning of settlement negotiations and other types of

settlement negotiations. And Mr. Wolfson and Mr. Fenske have covered this, but to the extent that plaintiffs are seeking factual information about the conspiracies, they have a number of other tools at their disposal to obtain this information, and it is not proportional to the needs of the case to invade these settlement negotiations to try to obtain information that is available to plaintiffs from other sources.

Now, with respect to the settlement agreements, again, the Special Master made no finding of how these settlement agreements are relevant to the plaintiffs' claims and the plaintiffs have failed to explain their relevance. And the main reasons why these settlement agreements are not, in fact, relevant to the plaintiffs' claims is because Ford and the other OEMs are not similarly situated to the indirect purchaser plaintiffs. Ford and the other OEMs are direct purchasers of these impacted auto parts and the plaintiffs are, of course, indirect purchasers.

I say this not because Ford is opining on the viability of plaintiffs' claim here, that's not what Ford is doing. Rather, there has been no finding that the terms of any settlement agreement involving direct purchaser claims can have any applicability to the indirect purchaser claims in this litigation. This is not a case where there is an issue of setoff where the amount of plaintiffs' damages may

be reduced because of a settlement between an OEM and its supplier.

And these settlement agreements are not applicable to plaintiffs' claims largely because the scope of the settlement agreements may be very different from the scope of plaintiffs' claims. For example, Ford and the other OEMs operate globally, and any settlement agreements may release all claims arising out of impacted purchases around the world, and they would not necessarily be limited to the claims arising out of U.S. purchases like those at issue here.

They may also release claims relating to multiple parts, including parts that are no longer in this litigation or perhaps parts that have never been a subject of this litigation.

And these potential differences in the scope of the claims highlight what we think is really a crucial fact, Your Honor, which is we don't actually know what the scope of plaintiffs' claims will be at trial, if there is a trial, because no class has been certified and no potential witnesses have been identified. So it is impossible to know at this stage whether Ford or any other OEM witness will be called to testify at trial.

And Mr. Fenske and Mr. Wolfson referenced the issue of witness bias. The plaintiffs make some vague allusions to

a potential bias that may be demonstrated through the settlement agreements, but that's insufficient to establish relevance where no particular witnesses have been identified. The confidential settlement agreements courts have found are not relevant to the issue of witness bias or credibility where there is no indication that a particular witness will testify.

Now, as you've heard, plaintiffs have speculated that the settlement agreements will shed light on the practices and mechanics of the OEMs' commercial relationship with their suppliers and that they may contain admissions concerning the scope or the workings of the conspiracy, but this is really just speculation. There is absolutely no indication that the settlement agreements would contain this type of information. And the plaintiffs are well aware that typical settlement agreements such as the ones they have entered into in this case do not generally contain factual descriptions or admissions of liability, and plaintiffs offer no explanation as to why they think these settlement agreements would depart so radically from standard negotiated agreements.

So even if the Court finds that there is some tangential relevance of the settlement agreements, again, it is not proportional to the needs of the case to require the production of all agreements where production of these

agreements is unlikely to resolve any of the pertinent issues in this litigation, and the production would likely negatively impact these important business relationships and have a chilling effect on future settlements.

So, Your Honor, Ford asks that you reverse the Special Master's order.

THE COURT: Okay.

MS. LEIVICK: Thank you.

MR. SURPRENANT: Dominic Surprenant, Quinn Emanuel, for the 17 Daimler entities. Your Honor, I will be brief.

I agree with the arguments of -- that have been made. I would add briefly that the chilling effect is real. As Your Honor said, these are hard discussions to have anyway, and if we are sitting at a mediation and we are trying to get a deal together on a global basis involving claims that are not before this Court, knowing that we are going to have to or could have to produce that document is going to make it that much harder, so the chilling effect is not academic, it is real.

Your Honor, on behalf of the Daimler entities, I am kind of surprised to be here. The motion to compel was made a long time ago, the Special Master granted it, we appealed on behalf of the Daimler entities, and Your Honor set it aside. And I would never tell Your Honor what Your Honor intended, but what we understood is there would be discovery

of the six OEMs, they would then produce documents and figure out what they had, and based on the information they gained they would move ahead.

And so Your Honor set it aside and the moving parties did not renew it, they didn't file a renewed motion to compel as against my clients, they didn't file the new motion to amend, and so I shouldn't be here. I shouldn't -- my clients shouldn't have been ordered to produce any privilege material.

And so I think on the merits, the Special Master's order should be reversed, and it certainly should be reversed as to my clients.

THE COURT: Okay.

MR. SURPRENANT: Thank you, Your Honor.

MR. SCHERKER: Your Honor --

THE COURT: You didn't think you would speak but maybe you will?

MR. SCHERKER: I wasn't sure. I appreciate the Court's indulgence. My name is Elliott Scherker on behalf of KMG.

THE COURT: How do you spell your last, Counsel?

MR. SCHERKER: S-C-H-E-R-K-E-R.

When we were here in June of last year arguing on behalf of the smaller SSEs to be carved out and the Court did so, with all due respect to Daimler, I was surprised to see

that Daimler filed anything. You will notice none of the other smaller SSEs that have been carved out in June, including KMG, did because it was our clear understanding based on the Court's ruling from the bench that we were going to be set aside to one side in ongoing process, and that when the parties and the --

THE COURT: Just temporarily.

MR. SCHERKER: Temporarily, correct. And there had been no word otherwise. I don't read the Special Master's order as doing that, but out of an abundance of caution, I would just like it to be clear that if anyone in the courtroom thinks the order that you are considering right now has any application to us, we completely join in what Daimler is saying, that we weren't -- we never intended to waive anything, and I'll bet none of the other smaller SSEs did either, by not filing something that Daimler had the prescience to file. I just wanted that on the record, Your Honor.

THE COURT: Okay.

MR. SCHERKER: Thank you.

MR. PERCONTE: Good morning, Your Honor. Jeff Perconte on behalf of Nissan North American, Inc.

And I will also be brief. I want to echo my colleagues' statements that the Court has already heard this morning, and will not repeat them.

We appeared, Judge, and have filed a separate brief just to inform the Court that also the chilling effect is real. Nissan has been able to resolve claims with suppliers confidentially without filing suit. The goal of that and the benefit of that is that it has allowed Nissan to maintain relationships with its suppliers as the Court has expressed and multiple counsel have now pointed out. These initial conversations are not easy to have, but they have allowed Nissan to continue to be able to supply with the parts that it needs to build its vehicles. And it also, of course, allows the parties to avoid the expense of litigation.

As counsel pointed out, I also need to speak generally because of confidentiality agreements. But I do want to emphasize that these confidentiality agreements are in place before any sort of discussions take place, and it is clear that the parties are sitting down to talk about settlement when these, quote/unquote, initial meetings occur. These settlements are preceded by months of negotiations, Judge, and exchange of information all for the purposes of settlement and covered by these confidentiality agreements.

And I think that the Special Master's error here regarding communications is drawing a line that is arbitrary and irrelevant to the settlement privilege between initial meetings and subsequent conversations. Our understanding of the Special Master's order as a, quote/unquote, initial

meeting is not covered, but all follow-up communications are covered by the privilege up until the settlement agreement itself.

And, Judge, I think a simple hypothetical shows why that is completely arbitrary, and that is if during an initial -- quote/unquote initial meeting where there is discussion about potential activity undertaken by a supplier and Nissan comes back a few weeks later and sends an e-mail asking hey, what about Y? You told us about X but what about Y? The discussion about X would not be covered during the initial meeting, quote/unquote initial meeting, but the question and answer about Y that comes after that initial meeting would be covered by the privilege under the Special Master's order, and it is just a nonsensical difference, Judge.

And I think the problem that Nissan is now experiencing is that confidentially suppliers have expressed to them they know -- they do -- are concerned about continuing settlement discussions post the Special Master's ruling in December. And suppliers with whom Nissan has not yet begun discussions have also expressed concerns confidentially about beginning those discussions given the Special Master's ruling.

And, Judge, so those are the real chilling effects of the Special Master's ruling here and I think that's the

very foundation of the Goodyear opinion. The Goodyear opinion really has three important holdings: one, confidentiality is needed for settlement and that there is a long tradition in American legal community of that being the case. Rule 408, second, is a reflection of that, that the communications are not relevant and they are never admissible as the Court says. And then three, near the end of the opinion the Court says any statements made in furtherance of settlement discussions are privilege, any statements, and the Special Master's ruling, Judge, respectfully treads all over that holding.

And so the making initial discussions not subject to the privilege and settlement agreements not subject to the privilege but everything in between subject to the privilege has a chilling effect both on starting new discussions with suppliers to avoid litigation but also continuing ongoing discussions with suppliers to maintain relationships and to avoid having to drag suppliers into court to remedy these issues.

Judge, with that, I don't have any further argument, and we have adopted our co-counsel's arguments.

THE COURT: Okay. Thank you.

MR. PERCONTE: Thank you.

THE COURT: All right. Ms. Romanenko.

MS. ROMANENKO: Good morning, Your Honor.

Victoria Romanenko for dealership plaintiffs.

Your Honor, just as far as one general issue, Ford has presented argument today, they've put in several briefs. Our view on that is they can do that but they shouldn't receive two bites at the apple.

THE COURT: Say that again. Could you speak into the microphone? I'm having a little bit of a time hearing you.

MS. ROMANENKO: Sure. So our view is Ford should not be receiving two bites at the apple. If they want to participate at this stage and have the issue resolved at this stage, that's fine. If they want to wait until their discovery is teed up, that's fine. But what we don't agree with is that they can argue here, get a ruling, avoid that ruling, and then make the same arguments again down the road when it is time for them to produce the discovery and the dispute -- the same dispute is teed up between the plaintiffs and Ford. So if they want to submit their arguments here, that's fine, but any decision should apply to them as well if their arguments are being considered. So just that general issue, we wanted to make that point.

Now, as far as responding to what we've heard this morning, what we are asking for here today are really some of the most basic facts about the conspiracy. We've been through it. How is the conspiracy carried out? How is it

concealed? How long did it last?

THE COURT: But that's not the issue. The issue is you are asking for facts that occurred during some meetings and I suppose are then put into documents because it is a document production thing. But how do you get by that Goodyear privilege, how do you get by that?

MS. ROMANENKO: So that's a good question. What the parties are asking the Court to do here is they are asking you to apply an over-expansive construction of the Goodyear privilege, and I will explain why. They basically say we want to keep the plaintiffs in this litigation from hearing any -- from knowing about any discussions about the conspiracy. And what we pointed out to the Master and what we've pointed out in our briefs to Your Honor is that that would be a -- construing the privilege so expansively, and I will get to why Goodyear doesn't construe it that expansively, but overexpanding that privilege would be a violation of the Supreme Court's edict in U.S. v. Nixon where the Supreme Court said that evidentiary privileges are not, quote, expansively construed for they are in derogation of the search for truth. So the privilege has to be narrowly construed, and that's been recognized by other cases within the Sixth Circuit. We've cited to Your Honor Winchester vs. City of Hopkinsville.

THE COURT: What does that mean? What does it mean

in the terms of what we are talking about here to narrowly construe it? If you have a meeting, which apparently is for the purpose apparently of settlement discussions, what do you do, cut out half of what's in the meeting, or can you speak freely in the meeting, or do you go on the record and say okay, now this is secret and then -- I mean, I don't understand how you divide these things up and narrow the privilege.

MS. ROMANENKO: Sure. So what Goodyear says, we should -- let's start with Goodyear because --

THE COURT: Okay.

MS. ROMANENKO: -- they do.

So what Goodyear was reviewing, what the Sixth Circuit was reviewing was the decision that settlement talks are always confidential, right. And in making its determination, what the Sixth Circuit said in Goodyear was that settlement negotiations were protected under the privilege. So what the Court said it was trying to protect was proposals of, quote, compromises that most effectively lead to settlement and, quote, proposed solutions to the parties' issues. So what we are talking about here, what Goodyear protects is offers of the terms of settlement.

Now, the descriptions in the conspiracy are not, quote, proposed solutions, they are not compromises, they are not settlement negotiations. They are just not discussions

of what terms are we going to settle this case on. Descriptions of the legal conspiratorial conduct were not at issue in the Goodyear case and Goodyear doesn't protect those. The opinion in Goodyear was about disclosure of the terms of an offer of settlement. That's what precipitated this case is that someone disclosed the terms of an offer in settlement and a later party sought to compel testimony about that disclosure.

That's what Goodyear was looking at and that's why Goodyear was specifically focused on settlement negotiations, how are we going to resolve this. So that's when the supplier says I will give you 50 million and cooperation so that you can settle your claims against the other defendants, and the OEM says no, no, no, you owe us 100 million and --

THE COURT: So if in these documents there is a description of what happened, you are saying that is not privilege. But --

MS. ROMANENKO: Correct.

THE COURT: -- in the same document there is a proposal to pay X dollars, okay, that's privileged?

MS. ROMANENKO: Yes.

THE COURT: So you are talking about documents, you would have to go document by document to see whether or not there was something privileged in it?

MS. ROMANENKO: That's right, that's right.

THE COURT: How long would that take if we have a million documents?

MS. ROMANENKO: Well, here we are talking about a pretty discrete universe of documents, right. We are talking about just the documents that were exchanged during a couple month period, maybe a five-month period, to discuss what happened and then how to resolve it. I mean --

THE COURT: That's not what the Master ordered either, right? Of course, this is de novo if it is privilege, I would think you would agree with that.

MS. ROMANENKO: So actually, Your Honor, just to very briefly address that, the standard of review here would be -- the standard of review for any review of a decision about the scope of the discovery is abuse of discretion, and Your Honor has reviewed multiple decisions by the Master on the scope of discovery under the abuse of discretion standard, so that would be the appropriate standard here.

THE COURT: But is this not more substantive in that it is talking about what is the privilege?

MS. ROMANENKO: Well, the issue isn't the substance. This is not, for instance, a motion in limine. If it was a motion in limine, maybe you would agree that this would be de novo. But here the Master is merely deciding what to allow production of and what to prohibit production of.

THE COURT: Well, the Master did not allow production of a document of the type we just talked about. The Master put up a bright line -- well, it is not so bright line -- put up a line of which from that period you turn over -- you do not turn over anything, so he really didn't go into the argument that you are making.

MS. ROMANENKO: Well, actually, what the Master has said is that proffers, quote, concerning the existence of the automotive parts conspiracy, its scope, duration and extent, as well as descriptions of parts involved and the wrongful acts of the conspirators, which would have been exchanged at initial meetings which is where the proffers took place, not the settlement negotiations but the proffers, before settlement discussions commenced are not privileged. So he did analyze what kind of information would be covered by the privilege and what kind would not be covered by the privilege.

He explained that discussions that occurred -- and this is from the hearing -- discussions that occurred at the initial meetings where defendants disclosed to the original equipment manufacturers the existence of a conspiracy, the nature, the scope, the duration, the parts that may have been involved are not settlement negotiations.

So he's tracking the language of Goodyear and frankly its progeny, which after Goodyear continues to say

Goodyear protects settlement negotiations. They don't say Goodyear protects proffers, Goodyear protects anything that happens before settlement negotiations, anything that leads up to settlement negotiations. He's taking -- he read Goodyear and he exactly applied what Goodyear stands for, being careful, and consistently with the Supreme Court's edict to construe the privilege narrowly to do so, not to overexpand the privilege such that anything and everything discussing the conspiracy would be swept in.

And he drew a bright line on two sides, right. On one side he said if you are talking about the conduct that's not a settlement negotiation, I'm applying Goodyear and I'm saying that's not privileged under Goodyear. However, when -- and he was actually I think extra careful. He said when we talk about documents analyzing damages created for the purpose of reaching a settlement that were exchanged at settlement communications, those are protected.

So he -- so he's saying very clearly if we are talking about just conspiratorial conduct, if we are doing what the OEMs have called proffers over and over again, they've used a specific term for these that makes it clear that these are not settlement negotiations, so if we are just talking about what happened, then we are not talking about privileged material that's discoverable.

THE COURT: Goodyear talks about in furtherance of

the settlement, so are these disclosures not in furtherance of this?

MS. ROMANENKO: So what Goodyear does is it talks -- it says -- one moment. It says about six different times that it's making a determination that settlement negotiations and settlement discussions are what is covered, and it explains pretty clearly that what it is trying to protect is the exchange of proposed solutions and compromises that lead to settlement.

So I know that the defendants and the OEMs have kind of latched onto these two words, in furtherance, but that doesn't mean let's sweep up everything around the discussions. It doesn't mean if some discussion was had and eventually four months later there was a settlement, that means that that discussion that didn't involve how are we going to settle this but just involved a factual disclosure is now subsumed.

In furtherance in Goodyear, merely is supposed to be synonymous with the words settlement negotiations. They were just trying to use those terms interchangeably so as not to constantly repeat the same thing.

THE COURT: Could you not get this same information from other sources? I mean, why don't you simply depose the person who was there?

MS. ROMANENKO: So we've taken at this point, as

Your Honor knows, lots of depositions.

THE COURT: Yes.

MS. ROMANENKO: We've gotten lots of documents. What we get a lot is somebody shows up and they say I don't remember, I don't know, I don't know what happened.

What we also get a lot is we want to depose someone and they are gone, they are no longer employed there, they retired, what have you, we just can't get at them.

We also -- as far as what has been produced to us, the data, for instance, it is very, very difficult to understand and make sense of often. I think one defendant raised at a previous hearing about our clients' production, that we actually spent $600,000 to try to get a clean version of the defendants' data. It is very, very difficult to take something like that data and turn it into a narrative or try to make sense of it. A lot of defendants won't even produce deponents to talk about the data. So we are looking at a bunch of numbers that have blanks, they come and go, maybe they are negative values, and that's not the same at all as getting a narrative description of that.

We've encountered a lot of obstacles in searching out some of this basic information about what happened in the conspiracy. This is a path through which we can get it. This is a path through which we can obtain a frank discussion between an OEM and a business partner. We have good reason

to believe that a business partner will tell the truth to its OEM or will at least be forthright, and that if it is not being that way, the OEM will see that.

So it is very different from getting segmented information from the defendants, from defendants telling us we can't give you a full set of interrogatory responses, we have to limit this by time period or OEM, and you won't get Nissan but you might get Ford, or from some defendant showing up at a deposition saying I just don't remember. This is a set of information that will actually flesh out for us what happened here. It is very different from the type of discovery that we have had so far, which has not been sufficient to completely flesh things out for us. That's exactly why we are seeking it, so that we can pursue our claims and have some sort of narrative to demonstrate to us what it is that happened here.

Another point that I did want to make, the OEMs were up here saying -- admitting that discussions started when the collusion was made public, right. So the fact of the matter is a defendant may try to self-interestedly shield these depositions -- sorry, these descriptions by trying to later characterize them as eventually leading to settlement. But these defendants and whatever other suppliers were involved, their hand was already forced, right, because the government agencies had made public that this collusion had

occurred. So now to, as Nissan has said, save their chain of supply, they needed to come to the OEMs and tell them what they did.

So whether there was a settlement or there wasn't a settlement, they weren't going to avoid making these disclosures. An OEM sees a guilty plea, they have questions, right. So a defendant can say let's cover this with a settlement privilege, let's negotiate a confidentiality agreement, and an OEM, they don't care.

THE COURT: So you are saying really the OEM hears about this and they say I want to talk to you. This has nothing to do with settlement at that point, it is just I want to know what you did so I know how much more we are paying or whatever.

MS. ROMANENKO: Right. As Mr. Wolfson said when he started out, the collusion was made public, then these conversations began. So these conversations are happening because the collusion was made public, because these suppliers now know that the OEMs know what they did.

So I think what we are getting from the defendants and to some degree the OEMs is kind of I guess I will say again a self-interested attempt to cover all of these communications, say, well, we ultimately got to settlement so these are communications in furtherance of settlement.

But what these are are factual descriptions that

they were going to have to make no matter what. This is -- what they are doing is they are creating a legal construct to basically try to block our access to these, and for a number of reasons that's not correct. That's not what Goodyear supports, but not only that, they have asserted no burden, they've not asserted that descriptions of the conspiracy aren't relevant, they couldn't do that.

THE COURT: What about the confidentiality agreement?

MS. ROMANENKO: Well, Your Honor, as we've cited in a number of cases in our brief, confidentiality agreements do not make something undiscoverable. So the fact that there was a private confidentiality agreement between the OEMs and the suppliers does not render it blocked from discovery; that's just a private agreement.

And I think that actually demonstrates why this kind of sort of unilateral determination that we are going to block these from -- we are going to try to make efforts to block these from third parties is just that. It is not a legal doctrine that actually prevents us from discovering it. It is just an internal agreement, let's try to shield these if we can because we would rather they not have them, right. That's what is at bottom here. It is not this is too burdensome for to us produce, this is going to take too much time. It is just we don't want them to have these, we would

rather keep these to ourselves.

And frankly, that's not a rationale that is considered under Rule 26 is we don't want them to have these. I understand they don't want us to have these, and they would produce them and they would be designated highly confidential and it would be the attorneys in the case that would look at them. Frankly, there are no settlement privileges in most circuits, and even in this circuit, the settlement privilege has been significantly curtailed.

So for them to say we only had these discussions because we expected that everything would be shielded under a settlement privilege, that's incorrect. A number of courts have recognized that. They can't say if you allow this, we will never settle anything ever again. That's just not how it works. They are not going to compromise away --

THE COURT: What about the chilling effect that has been referenced here to other settlement negotiations?

MS. ROMANENKO: So these OEMs and suppliers, they were never going to sue each other, right. They were always going to resolve their claims out of court. They are not suddenly going to start signing up for years of litigation because a group of lawyers can see their agreements.

And I do want to point out Mr. Wolfson expressed some concern about other OEMs being able to see settlement agreements or proffers. They are not parties to the case, so

just like we are not sending Subaru's data to FCA, we are not going to be handing around settlement agreements, you know, asking who wants to read which OEM's settlement agreement or who wants to see which OEM's proffer notes? So it's going to be a very limited universe of attorneys who are going to be looking at this.

And just to give Your Honor a quote from another court who was faced with a similar argument, they said to suggest, as do these plaintiffs, that the prospect of revealing settlement terms to a narrowly limited audience might impede out-of-court disposition seems wrongheaded, given the alternative to settlement would be a double whammy: the loss of the benefit of the bargain and more public airing occasioned by a full-blown trial.

And similarly, a circuit court stated while there is clearly an important public interest in favoring the compromise and settlement of disputes, disputes are routinely settled without the benefit of a privilege. It is thus clear that across-the-board recognition of a broad settlement negotiation privilege is not necessary to achieve settlement.

So, Your Honor, there is just no way that your allowing the productions of these documents is suddenly going to lead to a stoppage of out-of-court settlements and all of these OEMs suddenly suing these suppliers. Sure, it is probably more efficient for them to settle out of court and

they will keep doing that. The fact that some attorneys might view their materials is not going to change that. They would prefer that that not occur and they certainly have been very assertive in arguing that, but that's not going to change their behavior.

You know, just to look at what's happened so far, Nissan, for instance, made clear in its brief that it's going to keep resolving its claims out of court, and it has been continuing to do that. Obviously we have had no lawsuits by Nissan against suppliers. In the months that the Master's opinion was filed, the OEMs haven't sued any suppliers. You know, this opinion has been in place, it hasn't changed anything; they are going on as they have gone on. The idea that some lawyer is seeing what was disclosed to them is going to change that, it is just an empty threat.

And if we are talking about public interest, you know, I think we should keep in mind that the public interest clearly weighs in favor of providing information to our clients who are certainly some of most volnerable players in this chain of supply who don't make parts, who don't make cars, they don't have other access to this information, and who the OEMs and the Justice Department agrees have been buying cars that have been affected in the billions of dollars.

This litigation is extremely important and involves

high, high amounts of damages. There's no proportionate consideration that the OEMs or the defendants have given us that would countervail the high benefit of introducing information into this litigation that would help us understand our claims and litigate them to resolution.

Certainly there is nothing that we've seen where parties seeking to compel information about descriptions of collusive conduct have been told they can't do so. This is -- this is not us seeking information about settlement negotiations. We are just seeking basic information about what happened in the conspiracy.

THE COURT: Okay. Let's look a little bit at the actual order of the Master. Talking about communications prior to a date on which the conspiracy has been identified, were that the words? I don't have the exact words written down here.

MS. ROMANENKO: Are we talking about paragraph 2, documents evidencing discussions or exchange between OEMs and automotive parts suppliers?

THE COURT: Is that the paragraph that has the statement about before and after?

MS. ROMANENKO: This paragraph defines what information would have occurred at meetings before settlement negotiations.

THE COURT: I mean, I just wonder what is that

date? Who says -- let's say this order is enforced. Who says when the settlement negotiations started, where is that date coming from?

MS. ROMANENKO: So when the settlement negotiations started -- so as the Master put it in his order, after the meetings discussing the existence of the conspiracy, its scope, its duration, nature, extent, description of parts, wrongful acts, after those discussions ended and when discussions analyzing the damages began, that's when we have our settlement negotiation discussions beginning.

THE COURT: So it is going to be up to the individual person answering or entity answering the interrogatory to make that determination -- I mean, yes, answering the --

MS. ROMANENKO: The document request.

THE COURT: To make that determination as to that period, so they would review their own documents and say this applies here.

MS. ROMANENKO: Right, right. Once they stop seeing descriptions of the conspiracy and once they get into damages, that's when they say, okay, now we are covered, we don't produce this. These are settlement negotiations; that over there, that's proffers. And they don't even -- they don't even call these descriptions of the conduct settlement negotiations, they call them proffers, so they know, you

know. They have these items on their computers, you know. When they are reviewing them and copying them onto a jump drive to produce, they know what is the proffer versus what is the actual back-and-forth discussion of these were our damages, here is how we are going to resolve it.

And that's exactly what the Master was thinking and that's what the Goodyear court was thinking. You know, these kind of proffers, this kind of information about misconducts, that was not at all contemplated in Goodyear as being subject to being covered by this privilege.

THE COURT: Okay. And as to the settlement agreements, what's the relevance of settlement agreements to you?

MS. ROMANENKO: Sure. So as far as the settlement agreement -- and just one more quick comment about the defendants' Rule 408 argument. The cases that we have seen cited by mostly the defendants, also to some degree Ford and the OEMs, they are all about 408, they are about admissibility, right.

So they say, well, according to Goodyear, Rule 408 governs whether or not you can discover this information, not Rule 26. But obviously the federal rules make clear production can't be denied on the basis of admissibility, right. The very rule that govern these disputes, Rule 26, says information within this scope of discovery need not be

admissible in evidence to be discoverable.

So as one court explained, Congress chose to have limits on the admissibility of settlement material rather than limits on their discoverability. We don't get to discoverability until pretty far down the line in this litigation. You know, we are not saying rule today that we can introduce anything we want into evidence for any purpose. We are just saying at least give us the productions so we can review it. You know, if there is something down the line where we want to introduce something and they disagree with it, they can obviously challenge it, but that's not even an issue here. What at issue here is are these relevant, are they discoverable. It is not are they admissible.

So just to give you another quote, another court explained the premise of plaintiff's objection that these documents will be inadmissible at trial pursuant to Rule 408 is, as Judge Wall correctly pointed out, premature and irrelevant to the question of discoverability before the court.

THE COURT: And what did Goodyear mean when they talked about admissible?

MS. ROMANENKO: Goodyear did not say that admissibility is a requirement for discovery, for discoverability. Goodyear did say at the very end, frankly I think it was somewhat tossed off, oh, and it is not

admissible either. The plaintiffs seeking this information haven't establish admissibility. But the decision was made based on privilege, not admissibility, because Goodyear could not have overturned Rule 26. A district court cannot overrule a Federal Rule of Civil Procedure.

Just to give you one quote from the Supreme Court in Chambers v. Nasco which explains that a court is bound by the Rules of Civil Procedure, it says the rules themselves reject the contention that they may be discarded in the court's discretion. Disregard of the applicable rules also circumvents the rulemaking procedures in 28 U.S.C. 2071. So Goodyear couldn't have said we throw out Rule 26 and we use this new standard for discoverability which is admissibility.

So Goodyear, yes, they refer to the fact that the plaintiff didn't establish admissibility or an admissible use for the information he was seeking, but they didn't say and that's the standard that we are going to use to decide if this information can be produced. They couldn't have said that because Rule 26 would not have allowed that. And the Master recognized that too. He said during his December 9th hearing in the discovery rule we know clearly that admissibility is not a precondition to discovery.

I think Your Honor wanted to move on to the settlement agreements.

THE COURT: I want to know the relevance.

MS. ROMANENKO: Sure. So, first of all, as I think they have all acknowledged before Your Honor, the defendants and the OEMs are not arguing that the settlement agreements are privileged. They don't try to show any burden. So, again, we are in a situation where they just don't -- they actually say this in one of their briefs -- they don't want third parties to see them, which, again, is not a sufficient countervailing purpose under Rule 26.

THE COURT: So what's the relevance to you, what do you need these settlement agreements for?

MS. ROMANENKO: Sure. So, first of all, these agreements are going to help us understand the relationships between the suppliers and the OEMs and --

THE COURT: How is that?

MS. ROMANENKO: So I will respond to the arguments that we have heard from the others where they say that business relationships and the mechanics are not in the agreement. So, first of all, that's speculation, right. They don't know what one another's settlement agreements say.

They do say -- they said today that agreements were entered in order to restore business relationships. So of course they are going to provide information about relationships. I will give you an example. For instance, a lot of our settlement agreements, a lot of the plaintiffs' settlement agreements discuss this is how -- these are the

kinds of documents that are going to be provided as part of the settlement so plaintiffs can continue to pursue their claims, right, or to understand their claims or to confirm what it is that they are settling.

So similarly here in these agreements what we would expect to see is some description of these are the documents we used or these are the documents we are going to provide, and this is the cooperation we are going to provide, and this is sort of how we are going to go about helping you determine what is going on here and how our relationship was affected, how it will go forward, right. Presumably these agreements have information about how their relationship will be going forward.

THE COURT: But why is that information important to you?

MS. ROMANENKO: Well, for us to understand, for instance, was a bid rigged or did a bid rig affect the ultimate price, we need to know how does the relationship work when it is competitive, how does the relationship work when it is not competitive. So in order for us to understand how the relationship works, we need some background information about that so we can -- so what we are saying is we will look to the settlement agreement to get that kind of background information.

In addition to that, as I said, a lot of these -- a

lot of our settlement agreements explain these are the documents or this is the cooperation that is going to be provided to you, the plaintiff, or you, the OEM, under this settlement agreement, right.

So we, of course, come in -- our clients, again, they don't make cars, they don't make parts, so we need as much information as we can get about what kinds of documents we want to make sure we look at or what kinds of documents we request, what kinds of documents we think about, what kinds of information we go after in discovery, and this is one area where this will help a lot. You know, if somebody for instance is looking at one of our settlement agreements, they will see a bunch of things listed that the defendants are agreeing to provide to us and they can say ah-ha, so this is information that is considered to be the most crucial for pursuing these claims for evaluating what you might need in order to prove your case.

THE COURT: Even though they are in different positions, these are directs instead of the indirects?

MS. ROMANENKO: Well, the indirects have all alleged that the directs, correctly of course, that the directs have passed their damages on to us. So, yes, of course, their agreements are going to be relevant to that and the documents about their relationships are going to be relevant to that.

For instance, I will give you an example. We requested from a number of OEMs the supplier agreements, and a number of them said we can't give them to you, they are too burdensome or, you know, we don't have them for the whole time period that you want. So we are not getting that, you know, we are no getting that from every defendant, we are not getting the full scope of that.

So something -- so an agreement like this is going to help us flesh that out, fill in those gaps. That's exactly why we need that information. We don't have complete information from the other discovery that we've received thus far.

I think as we also talked about, a lot of the defendants have said after our guilty pleas, you know, there were no price effects, right, so these settlement agreements will tell us have the prices been changed so drastically in an ongoing contract that now there are no price effects? We are not saying we are using them to prove damages. We are saying for our own information we need to understand what happened after the guilty pleas, after these conversations happened and the agreement was entered into. Is there now -- is there now the change such that there are no more price effects on new vehicles? All right. So in order to understand that, we need to look at the agreements themselves.

Also, importantly, as the case law indicates and as I think the OEMs have talked about, these will help us to establish bias. So as the OEMs admit, various OEMs have made numerous statements on the record under oath multiple times in this case, right, so they have submitted declarations, they have given depositions. And we have seen the defendants use these in a variety of ways in motion practice against us, right.

So, for instance, the OEMs have made a number of statements about how an overcharge on a part is able or not able to be factored into a price of a finished car, and the defendants have made much that of, right. We, of course, disagree with that statement. But as Your Honor will recall, that was one of the statements that was the centerpiece of one of the AVRP defendant's presentations about a stay. Your Honor will remember we discussed that in January, and one of the defendants came up here with a PowerPoint presentation and he said we can't have a stay because we need to -- we have this statement from the OEMs that an overcharge on a part does not make it into the price of a finished car, and so we can't have a stay because we know that we are going to prevail on liability.

Well, we, of course, disagree with that, so we need these agreements to establish bias. We need to be able to say, well, these OEMs have settled with these defendants.

They are not just simply impartially saying that the indirect purchaser plaintiffs don't have any claims. We have to be able to defend ourselves against those types of statements, and that's a primary for us to do it.

THE COURT: Say that again.

MS. ROMANENKO: Well, I said we have to be able to defend ourselves against these types of statements by the OEMs, statements that attack our ability to demonstrate damages, and one way to do that is to demonstrate the existence of bias. We don't know what their settlement agreements might say about third-party discovery, about, you, know, what positions they can take in third-party discovery, what is going happen in third-party discovery. That's all going to be relevant to our analysis of the statements that they have made in discovery and that have been presented to Your Honor as statements against the indirect purchaser plaintiffs.

THE COURT: Okay.

MS. ROMANENKO: In essence, Your Honor, we are not seeking these settlement agreements in order to violate Rule 408 in any way. What we need from these agreements is the information that we are not getting in discovery. We need to be able to get background, we need to have the ability to establish bias, we need to understand how their relationships changed and how the prices changed after these

were entered into. It is something that these agreements will give us a clear view into that we are not getting a view into.

And given that there is no -- no argument from the OEMs or the defendants that there is any burden associated with providing these, no argument that there is any privilege here, simply an argument that they don't want us to have these because they consider them to be private, there is just no reason for them not to produce these. They are already going to be making a production to us. They are going to be producing all of these other things. If they disagree with how we use them, they have the right down the line to make a motion in limine.

But to deprive us of these now at this stage, to say you can't even see them, you can't evaluate, you can't judge for yourself what the contents are and how you are going to be able to use these to see if they can be helpful to you in your discovery efforts and your efforts to understand the case, to understand the conspiracy, that just can't be, we just can't be deprived of that in that fashion at this juncture. Right now we are just asking for discovery.

THE COURT: All right. Anything else?

MS. ROMANENKO: Yeah. I just wanted to, Your Honor, quickly address the claim that we didn't ask for

these. So we asked for all documents relating to your other OEMs' negotiations or communications with any of the defendants or other components or assembly suppliers in connection with defendants or other components or assembly suppliers' conduct at issue in MDL 2311, and documents, defendants or other components or assembly suppliers provided to you or other OEMs in connection with the facts described in any plaintiff complaints. I know that's a mouthful.

So, of course, settlement agreements are documents related to OEMs and parts suppliers negotiations and communications about the conspiracy and documents provided to the OEMs in connection with the facts described in the complaint. And the briefing makes clear we understood ourselves to have requested these. What we said back in March 2016 when describing a case, the Court ordered that any settlement agreement could be produced contrary to the position defendants are taking here. We also explained in another brief, agreements to resolve commercial disputes are clearly discoverable and implicate no privilege issue. The same is true of settlement agreements.

So we did mention these in our briefing, and the Master agreed. He said on January 24th that the issue of settlement agreements was, in fact, raised. So we did clearly ask for these. If they didn't understand us to ask for these, they had a year of litigation, hours of

negotiations to ask, hey, does this include settlement agreements? They didn't do that, all right. They made a strategic decision to just decide not to brief the issue and then to raise it to Your Honor and say that we never requested these.

THE COURT: Did the Master ever discuss relevance of these settlement agreements?

MS. ROMANENKO: Well, I think he stated that the materials requested were relevant. Did he -- did he break down one by one every specific type of document that could be encompassed? That would be difficult to do.

THE COURT: I'm not talking about that. I just mean in general the relevance of the settlement agreements.

MS. ROMANENKO: What the Master said is he -- or what we understood the Master to say is that he determined that what we were requesting was relevant.

THE COURT: Okay. Thank you.

MS. ROMANENKO: And the defendants didn't contest the relevance of the settlement agreements in any briefing below, even though we made clear that they were being requested, and even though they never sought clarification from us as to whether they were being requested.

Your Honor, I would just like to address Daimler's argument very quickly.

THE COURT: All right.

MS. ROMANENKO: Daimler seems to be saying that although the privilege issues are no different for one subpoenaed automaker than they are for another automaker, it would like to create more delay and be carved out of this production, so -- and it seems like maybe Kia is making the same argument.

So this argument seems to be based on a misinterpretation of the Court's order in June of last year, simply carving Daimler and the other small OEMs out of depositions, right. They say they are carved out, but all they were carved out of was the 30(b)(6) depositions which were needed to resolve the joint motion to compel which was seeking information about sales and purchase documents and data, right. So there were two motions. There was a joint motion to compel that was filed by the defendants and the plaintiffs, and then there was just the plaintiffs' motion to compel seeking information that was requested by request number 31.

So that motion was simply deferred until the joint motion could be decided, right. The Master said go take depositions so you can find your information that you need in order to resolve the joint motion to compel. But with regard to the plaintiffs' motion to compel seeking documents requested under request number 31, he said I'm deferring it, I'm specifically not ruling on it.

So basically what he did was he put it off until it could be reactivated once this other motion was ready to be heard. And then when the motion was renewed, when we said okay, so now the joint motion is ready to be heard, it is before you, we would like to have our motion resolved too, we would like to have the plaintiff's motion resolved. We didn't change the motion or whittle it down and say we are asking for this information from fewer than all of the OEMs, you know, we didn't say that we had modified it. In fact, we just attached our -- all of our briefing from January and March of 2016 to our notice saying we would like oral argument and we would like a decision on the plaintiffs' motion.

So we made clear that we were incorporating the whole thing, we weren't changing it, we weren't saying Daimler doesn't apply to you or Kia doesn't apply to you. So there is no reason for Daimler to be arguing that it didn't understand that its production was being sought in this motion or it was somehow not part of this just because it was told by Your Honor back in June that it didn't have to sit for the depositions that were necessary for the other motion to compel.

You know, obviously privilege issues or relevance issues do not change OEM by OEM. This order is either enforceable or it's not enforceable whether you are Daimler

or Honda or FCA, so carving out Daimler is not going to serve any purpose other than simply adding more delay.

THE COURT: Okay. Thank you. Reply?

MR. FENSKE: I will try to be brief, Your Honor. I would like to first discuss the settlement communications point and Ms. Romanenko's sort of fundamental argument about Goodyear, which is essentially that Goodyear only protects haggling over the settlement terms, right, which she calls settlement negotiations. And that's just not what Goodyear holds. As Your Honor mentioned, it clearly uses the phrase any communications in furtherance of settlement are privileged.

And in describing the reason for adopting that rule, the Court -- the Sixth Circuit made statements that only makes sense in the context of factual admissions and factual statements. For example, in describing why settlement communications are not relevant, the Court quoted another case for this. Quote, what is stated as fact on the record could very well not be the sort of evidence which the parties would otherwise actually contend to be wholly true. That's at page 981 of the Court's opinion. So the Court was clearly relying upon the general notion that any kind of statements, whether they are factual statements or ultimately haggling over the settlement terms, are not probative in litigation, and for that reason, that's one reason why a

settlement privilege should be recognized.

THE COURT: Okay. But do you not agree that there could be a meeting in which the OEM brings in the supplier and says, hey, what's this about this plea, and they have a discussion of the facts, no discussion of settlement, but say maybe we better get together and see how we are going to resolve this. That meeting you would get the information from, would you not --

MR. FENSKE: If it is not --

THE COURT: -- if it is not privilege?

MR. FENSKE: Let me put it this way. If there was a meeting discussing the underlying facts that's not for the purpose of furthering a settlement, it is not privilege and we have never claimed that it is.

What we have said is that the Master by categorically deciding that all statements at initial meetings about the underlying facts are not privileged even when they are made after a confidentiality agreement has been entered into that says the statements are made only for settlement purposes, the Master categorically ruled that even those statements are not privileged and that is the fundamental error, Your Honor.

And I won't discuss all of the cases cited in our brief that apply after the settlement privilege or Rule 408 to factual admissions; that's there for Your Honor. But

suffice it to say that there are a wealth of those cases; we cite them in our reply brief. And there is no case that we have been able to find that has ever compelled applying the settlement privilege underlying settlement communications.

There was some discussion about the differences in the Master's order versus liability issues and damages issues. The Master expressly held that discussions about damages are necessarily privileged, and we agree with that. But, of course, that highlights the arbitrary distinction between his statement in paragraph 2 of his order where he compelled production of statements at initial meetings about liability because damages and liability both go to the merits and both are -- a discussion of both of those issues is necessary to reach a reasonable resolution of claims. So the distinction that he drew between them is arbitrary. He was correct on the damages side but --

THE COURT: How would you word it?

MR. FENSKE: How would I word the order?

THE COURT: The Master's order.

MR. FENSKE: I would simply say any communication made in furtherance of settlement is privileged, and then if the Master were then to have concerns about the breadth of that statement, there are processes for resolving privilege disputes over individual documents. There is a privilege log process. The parties can negotiate the best way to resolve

any disputes they may have about whether a particular document is privileged. And then, of course, if it ultimately comes to it, the parties can submit the documents to the Court for in-camera review or the Court can decide for herself whether or not the documents are, in fact, privilege. This is just sort of Privilege 101. There are procedures in place for handling the issues that Your Honor has raised.

And then Ms. Romanenko made the point, which we don't dispute, that a confidentiality agreement by itself cannot immunize certain information from discovery, and we don't dispute that.

The reason why confidentiality agreements are relevant is because, as I mentioned before, they establish the factual predicate for the settlement privilege to apply, namely, one, that any statements made under the settlement agreement were made for the purpose of settlement -- or, I'm sorry, under the communication -- the confidentiality agreement were made for the purpose of settlement; and, two, that they were intended to be confidential. And if those two things are, in fact, true, then under Goodyear the settlement privilege applies.

The -- Ms. Romanenko made a point that -- essentially that the settlement agreements will be produced under the protective order so not everyone will have access to them and that somehow reduces the harm to the defendants

and the OEMs, but that misses the point. The point is that if the Court sustains the Master's ruling and holds on the flimsy, if nonexistent showing of relevance of these settlement agreements that any party can get them simply by requesting them, there's nothing to stop the DPPs from asking for them, there is nothing to stop one OEM from subpoenaing another or one defendant from subpoenaing another. And so they will -- the general sanctity that courts show to confidential settlement documents will be breached and parties will therefore be dissuaded from making the kinds of communications and the kinds of compromises that they need to be able to settle.

And then not to do a battle of quotations, Your Honor, but Ms. Romanenko read a lengthy quotation from a court that she implied said that it's a little ridiculous to think parties won't settle if their communications are made public. And there are a number of -- common sense comes out the other way, and there's a court that says, quote, were a court to disclose truly confidential settlement communications, it might indeed be damaging to settlement prospects in that case and even to parties' willingness to share confidential information in other cases, and that's the Holly case that we cited in our opening brief.

And the fundamental point, Your Honor, is that Your Honor has to apply a rule of law that applies not just to

this case but to any case, and what the Court's decision will signal to any of the parties that appear before this Court is that their settlement communications are subject to disclosure and so they have to be very careful about what they say. Parties who are trying to settle cases will have less information available to them and it will make it harder for them to settle.

And then just on the settlement agreements points specifically, Your Honor's questioning sort of hit the point home, which is that there is really no relevance that we can see to these. The direct purchasers have not moved to compel these -- the OEMs and members of the direct-purchaser class, so there is no set-off issue, there is no damages issue that these could possibly be relevant to.

And as to the bias point, again, the dealers have identified no witness who may testify that this may show that they are biased and no explanation as to how the settlement agreement might actually make them show they are biased. And it is premature, Your Honor, because trials where any witnesses are going to testify are years away. We have to go through class certification, we have to go to trial, and the Court can consider this, if necessary, at the appropriate time but that's not now.

And just last I would like to just briefly address the issue of whether or not the dealers asked for settlement

agreements. And the short answer is that request 31 does not directly ask for settlement agreements. If it is interpreted as broadly as it possibly could, arguably it encompasses settlement agreements. But look to the motion to compel because the motion to compel argued why they needed these documents and it asked only for communications. They said that they need communications to know how the defendants described the conspiracy to their OEMs. It makes no mention of settlement agreements.

The quotes that Ms. Romanenko just read to you are from their reply briefs after we filed our brief, after we had an opportunity to brief this, and when this came up the first time, which was at the hearing before the Master, we jumped up and objected on relevance grounds and that's reflected in the transcript. These were not requested and the Master exceeded his authority in compelling their production.

And that's all I have, Your Honor.

THE COURT: Thank you.

MR. WOLFSON: Good now afternoon, Your Honor, again.

To add a few points to what Mr. Fenske said on behalf of GM. One of the themes from Ms. Romanenko's argument was that somehow the OEMs got a better proffer or better evidence due to their relationship with the parts

suppliers, and she noted that a lot of witnesses say I don't remember or they are no longer at the company or there are gaps in the data, gaps in the documents. That may be true and I fully trust that that is exactly what's happening, but the same thing applied to the OEMs. The same people say I don't remember or they are no longer there, the documents are no longer there, the data is no longer there.

And the difference is that when you are in an informal relationship such as this, you are not subject to the power of the Court that has an obligation of the attorneys to provide all information that is for -- at least for interrogatories reasonably available to the party being -- who is subject to the discovery request, and for document requests, they have to conduct a reasonable investigation.

So Ms. Romanenko mentioned that certain interrogatories are missing information, and the parties are duty bound to provide what information is available to them or else be subject to sanctions. And if the lawyers provide information to OEM counsel as part of these discussions, that same information is available to them and is subject to discovery in this case. So the idea that we are getting somehow a better explanation or better discovery on the case, we have an issue and we disagree with that.

The distinction between damages discussions and

explanation of the liability portion is it's intertwined. The -- you can't have one without the other because you can't calculate damages without knowing what the scope of the damage was, what bids were affected, which parts were affected. And that's an iterative process where you are going back and forth where there is an initial discussion from the defendants saying, well, here is where we think things went wrong, and then there is a back and forth of the OEMs saying we think you are understating things. This is just normally how these conversations with defendants go.

To use an example from personal life, when I found that my son was sneaking candy a couple weeks ago, I confronted him with the empty wrapper and said is this it? Like a good, smart six-year-old he says, yeah, Dad, you caught me. But then when I found five more wrappers, I said, hey, you sure you want to really go with that that's the only one?

I mean, this is a conversation where the wrongdoer want to minimize what they are caught for, but the person pursuing -- or the party pursuing the claim often finds more evidence through alternative sources and discusses that and eventually they come to a resolution.

The -- let's see. The idea that there is this definitive point where -- or I believe Your Honor mentioned there was a gray line or not necessarily a bright line of

when these started. We take your point on that. And what the defendants and the OEMs are saying is that any of these types of discussions on substance did not occur until after whatever the point was where settlement negotiations officially started after that point.

And Your Honor asked how we would rewrite the Special Master's order. The -- the problem in the first instance is that the plaintiffs haven't met their burden to show discoverability, but understanding just that these were not undertaken, these substantive discussions were not undertaken until both parties understood they were in some sort of settlement communication is one possibility.

The idea that Goodyear could not have admissibility as part of its standard, I just want to very quickly note, we are talking about privilege here. Absolutely admissibility could be part of a privilege standard. In fact, the attorney-client privilege, one of the most well-accepted, prevalent privileges in the nation, it -- some courts have an exception where if there's an extremely substantial need and the only source for evidence on a certain point is attorney-client communications, in certain very limited instances you can broach the privilege to get those types of documents, and part of that is that there is a need and this is evidence that can be used.

But beyond just that analogy or that example, we

are also talking about proportionality under Rule 26. And I want to reiterate, this is a Rule 45 subpoena so burden is implicitly part of the analysis for determining whether we need to produce documents, but part of that underlying it is the Rule 26 standard. And if the plaintiffs can't establish a need for this, and there are very, very good reasons to hold it back such as the Goodyear privilege, such as the questionability -- or the questionable nature of the communications and lack of any admissibility for trial, we think that would weigh against production just even on proportionality issues alone.

And then with respect to the settlement agreements, I believe my prior argument, we addressed it, Mr. Fenske addressed I think the majority of the replies.

Ms. Romanenko, however, did say that we have not argued -- no argument for burden. Burden is not just about the time it takes to get documents or the number of people, the need to find them or how far you have to have go. Burden can also be more intangible, and a good example of this is trade secrets. When a third party is forced or is requested to produce trade secrets or highly, highly confidential information, cases say, well, that is a form of burden that we recognize and that it must be weighed against the relevance of the requested information.

And here the parties are saying look, there is

burden. We have talked about the chilling effects, we have talked about the confidentiality, we have talked about not wanting every other parts supplier out there to know the deals that we negotiated with individual part suppliers. We believe all of this adds up for a substantial burden on the OEMs, and I suspect the defendants would -- well, they have argued similar types of burden for themself.

And just to answer Your Honor's question, the Special Master did not address relevance. He, in fact, said -- I'm paraphrasing here -- I'm just going to do this to save time. We will leave it for the Court to determine the issues of relevance. So we don't believe that he actually weighed in on that issue.

Thank you, Your Honor.

THE COURT: Okay.

MS. LEIVICK: Just briefly, Your Honor, to respond to what Ms. Romanenko said at the outset of her argument, Ford, as I said, filed its objection because of the significance of these issues to Ford, but does not agree with Ms. Romanenko that Ford has waived its right to address these issues before the Special Master if there are issues that come up with respect to Ford's negotiations with the serving parties on this topic. Ford was not a part of the briefing before the Special Master, did not participate in any hearings.

Putting that aside, with respect to the settlement communications, Ms. Romanenko implied that this effort to prevent the production of these communications as being somehow driven by the defendants and that the OEMs don't really care about the confidentiality of these communications and this was just an effort by the defendants to come -- enter into a confidentiality agreement that would then somehow prevent the plaintiffs from getting this information.

But I want to make it clear that Ford takes the confidentiality of these negotiations very seriously, and it is not the case that Ford doesn't care whether these communications are kept confidential. And as I said, Ford has tried to resolve these issues confidentially with its suppliers, which is exactly why Ford is here today and has filed its briefs.

And just briefly, Your Honor, because Mr. Wolfson and Mr. Fenske have addressed this, Ford agrees that this process of negotiations with the suppliers is just that, a process. You can't draw a bright line where the factual proffers, the factual information stops and then negotiations begin. And there is a lot of back and forth between the OEM and the supplier on both the facts and damages and settlement offers that are all bound up together, and you can't draw that line and Goodyear does not draw that line.

With respect to the settlement agreements, again,

as Mr. Wolfson just said, the Special Master made no finding with respect to relevance of those agreements.

And there is no indication that any of the information that Ms. Romanenko thinks may be in the settlement agreements is actually in there. She said at one point that these settlement agreements may contain cooperation obligations or documents that the supplier is going to produce to the OEM, but none of that has anything to do with the mechanics of the business relationship between the OEM and the supplier, and that's the reason she says that they need these documents. And I completely agree with Mr. Wolfson that the burden in this case is the invasion of the confidentiality interests of the OEMs and the suppliers.

And just on the issue of bias, again, there's -- courts have not found that bias is a sufficient basis for relevance when there's no specific witnesses that have been identified as potential trial witnesses. And there has been no reason offered why the OEMs who are victims of these conspiracies would be biased in favor of the suppliers that conspired against them.

THE COURT: Okay.

MS. LEIVICK: Thank you.

MR. SURPRENANT: Briefly.

THE COURT: All right. Briefly. We've got to conclude this.

MR. SURPRENANT: I know it's almost lunch. I will be brief.

The notion, Your Honor, that there is no chilling effect because no litigation is going to happen because the OEMs will never really sue their suppliers is make believe, it is a fairytale. None of these highly competent defense counsel are going to write my client a check for $300 million if I can't credibly threaten a billion dollar lawsuit. It just -- the litigation threat has to be real. And counsel said that these are frank discussions. They are frank discussions, they need to be frank discussions, but they are not going to be frank discussions if they are discoverable.

One last point, Your Honor. I think the distinction is completely unworkable, but if all counsel wants are statements of fact about the conspiracy, then I think if that is going to be the order of Your Honor, that should be clear because that's not how counsel has construed the order before. But if it is only statement of facts, we did this, we did this, we did this, then the order ought to be clear because I think I'm almost certain I don't have anything to produce. Thank you.

MS. ROMANENKO: Your Honor, just less than five minutes, very quickly.

Your Honor, Mr. Fenske argued that these proffers are privileged because the parties ultimately settled, but I

just want to clarify what we are saying here is that the suppliers knew that they had to talk to these OEMs that they were in an ongoing relationship with. You know, like, let's say my husband finds out I cheated on him. I'm going to talk to him about that, you know, even without some kind of -- even if I don't know that there is going to be some kind of resolution. These OEMs found out that the suppliers with whom they had been in a more than decade-long relationship were actually bid rigging and price fixing to them, of course there is going to be a conversation that happens.

The fact that they ultimately end up entering into a settlement agreement doesn't change that. They are two different things. The disclosure of what they did is different from settlement negotiations which involves the discussions of proposed resolution -- proposed resolutions and solutions to the parties' issues, which is what Goodyear was talking about.

As far as this being an ongoing dialogue as we heard from Ford and GM, if that's the case, if there's information in a document that discusses damages, they are free to redact that pursuant to the order of the Master.

They also attack the Master for not conducting a privilege log assessment, but they never -- this is one of the things that upset us when we were looking at the objections is there's all this new -- all these new arguments

and all this new material in the objections that was never considered below because below they never said let's do a privilege log, let's do a privilege process. They knew if the Master reviewed all of their documents, then he would order at least some of them produced. So they hedged their beats and they just argued none of it was produceable.

They now come in and they change their position: well, if some of it is produceable, then it was wrong for him to not order a privilege log review. That is not how it works. We cited a lot of cases to Your Honor like BioLumix. They've got to make those arguments below.

And I think that's also pertinent to the burden argument. So they made this argument -- here at oral argument they say we have a new definition of what burden is without any case law. Burden is disclosure of information you don't want disclosed. That's not what burden means. That's not what Rule 26 looks at when it looks on burden. It is looking at the burden of production: do we have to hire a bunch of vendors, do we have to copy a bunch of paper documents, do we need specialists, do we need to pull people off the job? That's burden. We don't have anything from any of the defendants and OEMs saying it is burdensome to disclose information you would rather keep private, so it doesn't create a situation where they have to do anything.

And also along the lines of new arguments, you

know, I just want to note that the defendants didn't raise the issue of relevance below. They didn't say that this information or that information or the settlement agreements aren't relevant. So they all attacked the Master for not making a specific finding about settlement agreements, but that's because they didn't argue about that. The Master obviously knew that we requested settlement agreements and we knew that. Otherwise why would he have randomly ruled that they could be produced? They were obviously contemplated in our request, they were contemplated by the briefs, and if they wanted to make a relevance argument, they could have made it, we could have addressed it, and the Master could have given a more full opinion on it. But they made their choices so those choices sit with them now today during their objections.

That is all I have. Thank you.

THE COURT: All right. Anything else?

MR. FENSKE: Just briefly. I won't even argue the point, Your Honor, that there is a transcript of the hearing before the Special Master where we clearly laid out a relevance objection at the first time that it was brought up at his ruling, and that's in the record and that's all I have to say.

THE COURT: Okay. The Court will issue an opinion. Thank you very much.

THE COURT REPORTER: All rise. Court is in recess.

(Court recessed at 12:32 p.m.)

– – –

CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of In Re: Automotive Parts Antitrust Litigation, Case No. 12-02311, on Tuesday, May 16, 2017.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 06/05/2017

Detroit, Michigan